Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

October 2009 Term

RICKY DALE RAWLINS, JR.,

PETITIONER

versus

DAVID C. MILLER, WARDEN,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a COA should have been granted after the U.S. Court of Appeals denied the appeal of a petition for writ of habeas corpus pursuant 28 U.S.C. § 2254 that contained 1) a properly preserved objection to the Sixth Amendment Confrontation Clause. And, 2) whether during Petitioner's trial and closing argument, the prosecutor's highly prejudicial and improper remarks to the jury irreversibly tainted the jury against Petitioner and denied him his constitutional right to a fair trial and 3) whether Petitioner was wrongly convicted on insufficient evidence.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED .. 1

CONCISE STATEMENT OF THE CASE 2

REVIEW OF STATE-COURT JUDGMENT
FEDERAL QUESTIONS SOUGHT
TO BE REVIEWED 5

REASONS RELIED UPON FOR ALLOWANCE
OF THIS WRIT 5

CONCLUSION 7

APPENDIX
A. Opinion and order 1
B. Order Denying Certificate of Appealability ... 1

TABLE OF CITED AUTHORITIES

UNITED STATES SUPREME COURT

Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) 7

Chapman v. California, 386 U.S. 18, 24,
87 S.Ct 824, 828, 17 L.Ed.2d 705 (1967) 7

Crawford v. Washington, 541 U.S. 36 (2004) 12

Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) .. 9

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781,
61 L.Ed.2d 560 (1979) 9

Miller-El v Cockrell, 537 U.S. 322, 336 (2003) 12

UNITED STATES CONSTITUTION

U.S. Const. amend V ..... 1, passim

U.S. Const. amend VI ..... 1, passim

UNITED STATES CODE

28 U.S.C. § 2254 ..... 4, passim

28 U.S.C. § 2253(c)(2) 12

28 U.S.C. § 1254(1) 1

OPINIONS BELOW

The Order Denying Certificate of Appealability of the United States Court of Appeals for the Tenth Circuit was rendered on October 2, 2009 and is unreported. The Order is attached to this Petition as Appendix "B," The Opinion and Order by the district court denying Petitioner's Petition for Writ of Certiorari pursuant to 28 U.S.C. § 2254 is attached as Appendix "A."

JURISDICTION

The Order Denying Certificate of Appealability of the United States Court of Appeals for the Tenth Circuit was entered on October 2, 2009. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 2254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend V:

The Fifth Amendment to the United States Constitution provides in relevant part that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...nor shall any person...be deprived of life, liberty, or property, without due process of law..."

U.S. Const. amend VI:

The Sixth Amendment to the United States Constitution provides in relevant part that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

CONCISE STATEMENT OF THE CASE

Mr. Ricky Rawlins, Jr. ("Petitioner") was charged, along with his brother Kenneth Rawlins ("Kenneth") and father Ricky Dale Rawlins, Sr. ("Ricky, Sr") with three counts of shooting with intent to kill on May 21, 2003, in the District Court of Love County, Oklahoma. There were three alleged victims, Michael Ayers ("Mike"), Stacie Ayers ("Stacie"), and Jacob Ayers ("Jacob"), Mike and Stacie's young son. While the case was fact intensive, the relevant facts pertinent to the issues herein are recited below.

Stacie was a process server. On April 19, 2003, Stacie went to the Rawlins' rurally located house with Jacob and Mike (who was the driver of the truck the three were riding in) to serve papers on Kenneth. Mike drove up the long driveway toward the Rawlins' house. Shortly after, Ricky, Sr went outside the house. According to Kenneth and Petitioner, they thought Ricky, Sr was going outside to meet a contractor his dad had been calling.

Nevertheless, one of the arrivals was Stacie Ayers and she was attempting to obtain service upon Kenneth. Upon Rawlins, Sr's discovering this, Rawlins, Sr and Stacie began to argue about the process service. Mike soon got out of the pickup and joined the verbal dispute.

A short time later during the confrontation, Petitioner and Kenneth came out of the house with guns. Shots were ultimately fired by Petitioner and Kenneth toward the vicinity of the truck. Tragically, Jacob, who was in the truck, was shot and injured severely, with permanent damage occurring to his brain. Neither Stacie or Mike were injured.

It was Petitioner and Kenneth's defense that while the verbal confrontation about the service was ongoing between Stacie, Mike and Ricky, Sr., Mike had pointed a gun at their father. Petitioner and Kenneth both testified they thought Mike was going to kill their

father, which is why they each fired weapons toward the Ayers.

Mike testified at trial and admitted he had a gun with him that day. However, a testimonial dispute existed whether or not Mike was actually pointing his gun at the father. Petitioner testified Mike was pointing the gun at his father and he thought he was going to kill him. Kenneth testified he thought Mike had shot at his brother and he was going to be shot next. The two brothers also thought Mike was trying to run over their father with the truck Mike was driving.

Mike testified initially he didn't have a gun in his hand but then he went to the truck and retrieved one because he thought his wife was going to be shot by either one of the Rawlins brothers because they both had guns. Mike also stated the gun remained at his side the entire time. This point of contention, i.e., whether Mike's gun was pointed at the father, Petitioner submits was significant in the case.

Improper hearsay evidence pertaining to the "pointing of the gun" which came in through the state's law enforcement witness, rendered Petitioner's trial unconstitutionally unfair (as is set forth below).

The recollection of events by all adult parties involved also conflicted as to when the shooting toward the Ayers' vehicle actually occurred. The two Rawlins brothers testified the shooting occurred when their dad was standing by the Ayers' truck and when Mike had the gun. Mike and Stacie testified the shooting occurred as the Ayers were attempting to leave the property. A weapons expert testified that the shots were fired through the left rear window and left side of the pickup. The Tenth Circuit stated the evidence "tended" to show the Ayreses were in retreat when Petitioner began shooting (Appendix "A" at pg. 13). But all adult parties involved in the shooting testified the series of events occurred "very fast."

It was undisputed that Petitioner was extremely upset and remorseful that a little boy had been shot. After law enforcement arrived at the scene, Petitioner repeatedly asked the sheriff of Love County, Joe Russell, to shoot him. Russell testified Petitioner was extremely upset after he found out Jacob had been shot. Ricky told Russell he thought he was protecting his father.

Rawlins, Sr. was tried separately and found guilty of assault and battery with a dangerous weapon and assessed punishment at one year. Kenneth and Petitioner were tried jointly. Petitioner was convicted of shooting with intent to kill Mike Ayers and assessed punishment at 25 years. Petitioner was also found guilty of assault and battery with a deadly weapon of Stacie Ayers and assessed punishment at 12 years and guilty of assault and battery with a deadly weapon of Jacob Ayers and assessed punishment at 12 years. Petitioner was sentenced on August 26, 2004 in accordance with the jury's verdict and assessment and the sentences were ordered to run consecutively.

A direct appeal to the Oklahoma Court of criminal Appeals ("OCCA") followed. The OCCA affirmed the judgment and sentence of shooting with intent to kill Mike Ayers but reversed and remanded for new trial the convictions related to Stacie Ayers and Jacob Ayers due to jury instruction error.

Petitioner then filed pursuant 28 U.S.C. § 2254, a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Oklahoma pertaining to the remaining conviction of shooting with intent to kill Mike Ayers.

An evidentiary hearing was subsequently held by the U.S. district judge wherein Petitioner presented Ricky Rawlins, Sr as a witness to support his claim for habeas relief related to improper hearsay statements attributed to him by a state's witness during Petitioner's trial.

Thereafter, on October 14, 2008, the Honorable David Seay, U.S. District Judge, issued an Opinion and Order denying the petition for writ of habeas corpus (Appendix "A"). Petitioner filed a Notice of Appeal to the U.S. Court of Appeals for the Tenth Circuit and filed an Application for a Certificate of Appealability and Brief in support. On October 2, 2009, the U.S. Court of Appeals for the Tenth Circuit issued an Order Denying Certificate of Appealability (Appendix "B").

. REVIEW OF STATE-COURT JUDGMENT FEDERAL QUESTIONS SOUGHT TO BE REVIEWED

I. Confrontation Clause Claim

Petitioner's right to confront his father was violated at trial when state witness Kevin McIntyre,[1] an inspector with the district attorney's office, testified that shortly after the incident, Ricky, Sr told him Mike never pointed the gun at him but kept it at his side the entire time. The prosecutor was also allowed to read from and questioned Petitioner and Kenneth at length about a written statement their father had given to authorities two days after the incident in which Ricky, Sr did not mention anything about Mike pointing a gun at him or shooting at him. The prosecutor also used the hearsay statements of the father during closing argument. Trial counsel objected to the admission of the hearsay statements of the father at trial, to wit:

Inspector McIntyre's relevant testimony was as follows:

1

It was revealed during the evidentiary hearing that McIntyre had been under investigation by the grand jury for some charges and there was an indictment against him that involved missing funds from the drug task force. McIntyre entered into a plea agreement related to the charges.

Q. (By the prosecutor): What did he tell you about Mike Ayres and the gun?
Trial counsel: Your Honor, that's hearsay.
THE COURT: Overruled.

A. That Mr. Ayres never pointed the gun at him and that he kept it to his side the entire time.

Q. Did you ask him, did Mr. Ayers point the gun at you specifically?

A. Yes, I did.

Q. And his reply was, no he didn't?

A. No, he did not.

(Vol. II, Tr. 349).

Trial counsel continued to object to the inadmissible hearsay and the trial court continued to overrule him, stating, "It is hearsay, but it's admissible hearsay." The record at the trial level is amply supported that this issue was timely and properly raised. Due to the trial court's error in allowing the improper hearsay statements of Rawlins, Sr., the jury had before it Rawlins, Sr.'s written statement through three different witnesses and also was reiterated and emphasized during the prosecutor's closing argument.

The prosecutor recognized that Mike pointing the gun at Petitioner's father, threatening his father with it or shooting at his father, was crucial to Petitioner's defense. In recognition of the importance of the contested fact, the prosecutor told the jury in closing arguments "It's one of the most important parts of their defense." (Vol. III, Tr. 519). The prosecutor also argued in closing that Petitioner's father, in his statement "...never indicates anyone pointed the gun at him, never indicates that anyone shot at him or any member of his family.", and that "The best evidence that it never happened is the father's statement..." (Vol. III, Tr. 559). The importance of Ricky, Sr.'s statements to the jury was established by the jury's note to the court during deliberations requesting

"Deposition of Mr. Rick Rawlins, Sr.'s statement handwritten 21 April,..." (Vol. III, Tr. 565).

Direct State Appeal: Petitioner raised the confrontation clause issue to the Oklahoma Court of Criminal Appeals. In its Summary Opinion, the OCCA acknowledged there was inadmissible hearsay heard by the jury but the Court found the statements attributed to Petitioner's father "did not ultimately affect the outcome of the trial and any error in their admission was harmless beyond a reasonable doubt." (Appendix "A" at pg. 18).

Federal Proceedings: Once again, Petitioner raised the confrontation clause issue in the federal proceedings by presenting the argument in his Petition for Writ of Habeas Corpus (Ground Four). An evidentiary hearing was subsequently held by the U.S. district judge wherein Petitioner presented Ricky Rawlins, Sr as a witness to support his claim for habeas relief related to his alleged hearsay statements which were wrongly admitted at his trial. Ricky, Sr testified at the hearing that he never told Inspector McIntyre that Mike did not point a gun at him and his written statement was a very broad description of what had happened rather than a comprehensive account (Appendix "B" at pg. 10).

Following the evidentiary hearing, the U.S. District Court entered its Opinion and Order holding it had reviewed the statements at issue and agreed with the OCCA that the statements attributed to the Appellant's father did not ultimately affect the outcome of the trial and any error in their admission was harmless beyond a reasonable doubt. (Appendix "A" at pg. 18).

Federal Appeal Proceedings: Petitioner raised the confrontation clause issue to the U.S. Court of Appeals for the Tenth Circuit in Argument Three of his Application for a Certificate of Appealability.

Jurisdiction of this Court: As is demonstrated above, this federal question was timely and properly raised and accordingly, this Court has jurisdiction to review Petitioner's judgment on a writ of certiorari.

II.

Prosecutorial Misconduct Rendered the Proceedings Against Petitioner Fundamentally Unfair, Denying Petitioner's Rights to Due Process

Petitioner suffered actual prejudice when the prosecutor's conduct rendered his trial fundamentally unfair. The error was not harmless and violated Petitioner's rights to due process. U.S. Const. Amend. V; Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct 824, 828, 17 L.Ed.2d 705 (1967).

During Petitioner's trial and closing argument, the prosecutor made highly prejudicial and improper remarks to the jury which irreversibly tainted the jury against Petitioner. Specifically, the prosecutor made comments which were designed to 1) improperly inflame the jury; 2) personally align the prosecution office with the victims; 3) improperly influence the jury by bolstering the veracity of state's witnesses. Most of the comments were objected to by trial counsel.

Regarding the veracity of the state's witnesses, the prosecutor told the jury:

(By the prosecutor): Joe Russell, Gary Watson, Kevin McIntyre, Ronald Jones and Paul Abel are all people that are going to be back testifying in court again some day. It's important for them to have reputation of being a truth teller. (Vol. III, Tr. 527).

Trial counsel immediately objected, but the trial court overruled the objection, stating, "It's fair comment." (Vol. III, Tr. 527).

The prosecutor then continued his assault upon Petitioner Rawlins's rights when he continued to vouch for the integrity of the state's witnesses when he stated:

(By the prosecutor): Once one of those people or once one of us lawyers loses our reputation for being a truth teller, we need to change professions because we're out of business... (Vol. III, Tr. 527, 528).

And when the prosecutor vouched for Michael and Stacey Ayres he stated:

(By the prosecutor): I would submit to you very honest terms their recollection of events. (Vol. III, Tr. 558).

The many instances of prosecutorial misconduct are voluminous, and each instance was presented in the direct appeal to the OCCA and the federal district and appellate courts.

Direct Appeal: The OCCA concluded some misconduct occurred but that the misconduct did not infect the trial with unfairness as to make the resulting conviction a denial of due process.

Federal Proceedings: Petitioner raised the prosecutorial misconduct and violation of his rights to due process in his petition for writ of habeas corpus. Subsequently, the U.S. District Court incorrectly found that after reviewing the record, the decision by the OCCA was not contrary to or an unreasonable application of federal law and the decision was not based on an "unreasonable determination of the facts." (Appendix "A" at pg. 17).

Federal Appeal: The violation of Petitioner's due process rights due to prosecutorial misconduct was raised as Argument Two in petitioner's Application for a Certificate of Appealability. In finding against Petitioner's claim of error, the U.S. Court of Appeals determined that the OCCA's resolution of the issue was not contrary to or an unreasonable application of this Court's decision in Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

Jurisdiction of this Court: As is demonstrated above, this federal question was timely and properly raised and accordingly, this Court has jurisdiction to review Petitioner's judgment on a writ of certiorari.

III. Insufficient Evidence

Petitioner was wrongly convicted on insufficient evidence. After viewing the evidence in the light most favorable to the state, any rational trier of fact could not have found the essential elements of shooting with intent to kill beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The OCCA, the U.S. district court and U.S. Court of Appeals were presented with Petitioner's claim of insufficient evidence. Thus, this Court has jurisdiction to review this claim.

Each reviewing court, as is required in Jackson, is directed to independently review the record evidence under the standard set forth in Jackson. The U.S. District Court conducted a de novo review but did not properly apply the elements as to the evidence presented. If the Court had done a proper review, Petitioner submits the Court would have determined that reasonable jurists could debate the petition should have been resolved in a different manner or would have found the district court's assessment of the constitutional claims debatable or wrong. The U.S. Court of Appeals subsequently found "...there was sufficient circumstantial evidence from which a reasonable juror could find that Ricky possessed the requisite intent." (Appendix "B" at pg. 15). As is set forth below, Petitioner asserts this finding by the U.S. Court of Appeals is flawed.

REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT

The devastating and unconstitutional impact of the improper repeated admissions of Rawlins, Sr.'s hearsay statements during the trial cannot be overstated. The jury verdict was unduly tainted by the

improper hearsay and thus the admission had a substantial and injurious effect or influence in determining the jury's verdict. Brecht; supra.

In its' Order Denying Certificate of Appealability, the Tenth Circuit determined that "Despite the apparently quick pace at which the events unfolded, a rational jury could conclude that a reasonable person in Ricky's position would have determined that any danger to Mr. Rawlins had passed and that the use of deadly force was no longer justified." (Appendix at pg. 14; emphasis added). This finding by the Tenth Circuit is telling. First, Petitioner asserts the Court appears to concede that Ricky Sr was in fact "in danger" and the use of deadly force by Petitioner could have been justified. Id. Secondly, the Court also appears to concede the events unfolded at a quick pace. As the testimonial evidence at trial supports, this fact is evident. Thus, what a "rational jury could conclude" and what a "reasonable person would have determined" is beclouded by the mere fact that the sequence of events happened so fast, it is impossible to know how a reasonable person would have reacted under the circumstances.

The improper hearsay statements which were wrongly admitted during Petitioner's trial violated his constitutional right to confront witnesses and also affected his right to due process, that there must be sufficient evidence of all the elements of the offense. The father's hearsay statements (which were refuted by the father in the evidentiary hearing held before the U.S. District Court in the habeas proceedings) had a substantial and injurious effect or influence in determining the jury's verdict.

Based on the facts of the case, the finding by the Tenth Circuit that "a reasonable person in Ricky's position would have determined that any danger to Mr. Rawlins had passed and that the use of deadly force was

no longer justified" (Appendix "B" at pg. 14) and the evidence that everything happened at a very quick pace makes it impossible, Petitioner submits, for a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. It also makes it impossible for a reasonable jury to find that Petitioner's use of deadly force in the defense of his father was not justified, which affects the finding of the Courts that the error was not harmless.

The Tenth Circuit's finding that a rational jury could conclude a reasonable person in Ricky's position would have determined any danger to Ricky, Sr had passed (thus the use of deadly force no longer being justified) does not comport with the Court's finding that error did not have a substantial and injurious effect or influence in determining the jury's verdict.

The prosecutor's own statements during closing argument evidence that the "pointing of the gun" issue was of paramount importance to the case. The prosecutor recognized that Mike pointing the gun at Petitioner's father, threatening his father with it or shooting at his father, was crucial to Petitioner's defense. The prosecutor told the jury in closing arguments "It's one of the most important parts of their defense." (Vol. III, Tr. 519). The prosecutor also argued in closing that Petitioner's father, in his statement "...never indicates anyone pointed the gun at him, never indicates that anyone shot at him or any member of his family.", and that "The best evidence that it never happened is the father's statement..." (Vol. III, Tr. 559).

To the jury, the importance of Ricky, Sr.'s statements was also established by the jury's note to the court during deliberations requesting "Deposition of Mr. Rick Rawlins, Sr.'s statement handwritten 21 April,..." (Vol. III, Tr. 565).

This writ should be granted because the Confrontation Clause issue is of paramount importance to all defendants asserting their rights to confrontation.

In denying Petitioner's COA, the Tenth Circuit Court of Appeals has ignored this Honorable Court's holdings in Crawford v. Washington, 541 U.S. 36 (2004), by finding Petitioner is not entitled to a COA on this issue. Accordingly, this petition for writ of certiorari should be granted.

Petitioner seeks certiorari because of the gravity of the questions presented and the affect this Court's decision will have upon those in alike circumstances throughout the United States.

The court of appeals incorrectly found Petitioner failed to make a substantial showing of the denial of a constitutional right to obtain a COA. 28 U.S.C. § 2253(c)(2). The district court and the court of appeals' decisions gravely undermines the entire judicial process.

The case herein cries out for justice. Petitioner believes any reasonable jurist "...could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v Cockrell, 537 U.S. 322, 336 (2003).

The court of appeals ignored the obvious violations of Petitioner's constitutional rights and as a result, Petitioner was harmed by being wrongly incarcerated. Petitioner's sentence clearly is a violation of his Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution. Consequently, Petitioner has shown the denial of constitutional rights and he was harmed by such denials. The court of appeals was incorrect in finding Petitioner did not make the showing necessary to obtain a COA. The law, justice, equity, and everything we hold dear and just in our judicial system requires the COA should have been issued and the court of appeals' judgment was error.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX "A"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF OKLAHOMA

RICKY DALE RAWLINS,	) Date filed:
	) October 14, 2008
Petitioner,	)
	)
v.	) No. CIV. 07-359-FHS
	)
DAVID C. MILLER,	)
	)
Respondent.	)

OPINION AND ORDER

Before this court is petitioner's Petition for a Writ of Habeas Corpus. Petitioner, an inmate currently incarcerated at Lawton Correctional Facility in Lawton, Oklahoma, attacks his conviction in Love County District Court Case Number CF-2003-78 for Shooting win intent to kill. He sets forth the following grounds for relief:

I. Reversible error occurred when the trial court failed to instruct the jury according to the law.[1]

II. The evidence in insufficient to sustain Mr. Rawlins' convictions therefore his convictions violated the due process clause of the 14th Amendment of the United

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[1] This proposition was abandoned by plaintiff. It was not addressed in the brief filed by plaintiff and it was not argued at the hearing held in this matter. As a result, this court finds that this proposition had been abandoned.

States Constitution and Article 2, Section 7 of the Oklahoma Constitution.

III. Mr. Rawlins received ineffective assistance of trial counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

IV. Prosecutor misconduct in closing arguments denied Rawlins his right to a fair trial in violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the Oklahoma Constitution.

V. The trial court erred in admitting hearsay statements and the admission of the hearsay statements were improper and denied Petitioner his rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article 2, Section 20 of the Oklahoma Constitution.

VI. The trial court erred in instructing the jury regarding the court's authority to suspend or defer a sentence or impose a sentence less than the jury's assessment of sentence.

VII. The trial errors complained of herein cumulatively denied Petitioner's right to a fair trial under the United States and Oklahoma Constitution and therefore, his convictions and sentences must be reversed.

Respondent concedes petitioner has exhausted his state court remedies for the purpose of federal habeas corpus review and has submitted the following records to the court for consideration in this matter:

A. Petitioner's brief in his direct appeal.
B. The State's brief in petitioner's direct appeal.
C. Summary Opinion affirming in part and reversing and remanding in part petitioner's Judgment and Sentence. Rawlins v. State, No. F-2004-866 (Okla. Crim. App. Aug. 17, 2006).
D. The three volume trial transcript.
E. The original record.

I. Sufficiency Evidence

In this habeas action, petitioner alleges his conviction for shooting with intent to kill was not supported by sufficient evidence. Respondent asserts the Oklahoma Court of Criminal Appeals considered this issue and found no merit to this claim in petitioner's direct appeal. Under the revised federal habeas corpus statutes, habeas corpus relief is proper only when the state court adjudication of a claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d).

The court finds the facts as follows. On April 16, 2003, part-time process server Stacey Ayres was driven by her husband, Mike Ayres, to a residence to serve summons on petitioner's brother, Kenneth Rawlins. The Rawlins family property was close to the Ayres' farm, and Mike Ayres knew the petitioner, Ricky Rawlins, Jr., and his brother Kenneth. (Tr. I 178-179). On this initial attempt to serve papers, Stacey was met in front of the house by Ricky Rawlins, Sr., the father of Ricky Jr., and Kenneth. (Tr. I 131). The elder Rawlins told Stacey that Kenneth was not home and he did not know when he would return. Stacey told the father she would try again in a few days. (Tr. I 131-33).

Three days later, Stacey Ayres returned to serve Kenneth. She was again driven by Mike, and this time Stacey's 12 year old son, Jacob, was also in the vehicle. (Tr. I 134). As with the previous visit, Mike stopped the truck in the drive just south of the cattle guard and when Stacey walked up, she was again met by Mr. Rawlins, Sr. (Tr. I 135). Mr. Rawlins, Sr. again told her that Kenneth was not home. (Tr. I 135) Stacey's back was to the pickup and her front was facing Mr. Rawlins, Sr.. Mr. Rawlins, Sr. was standing between Stacey and the trailer house. Stacey testified at that time she heard Mike say he saw Kenneth Rawlins at the house. Stacey said she turned around a saw Mike standing in front of their pickup. She then turned around and looked at Mr. Rawlins, Sr. and dropped the papers at his feet because he refused to take them. She then told Rawlins, Sr. to tell Kenneth he is now served. (Tr. I 135).

When Stacey dropped the papers, Mr. Rawlins, Sr. told her to pick up the papers accusing her of trespassing and littering. He told Stacey he was going

to call the Sheriff. (Tr. I 136, 187). Mike Ayres said he tried to diffuse the situation reminding Rawlins that they were neighbors and that this was just her job. (Tr. I 188). However, Mr. Rawlins, Sr. was still visibly angry, and he followed Stacey as she walked back to the pickup. At this point, Mike noticed petitioner was walking towards them with a shotgun in his hand. (Tr. I 189).

Stacey Ayres kept her focus on Rawlins, Sr., who was following her step-for-step as she walked back to her pickup. Stacey said she could see her son Jacob's feet hanging just below the truck's open passenger door. When Stacey got to the passenger door, Rawlins Sr., reached out and slammed the door shut. At that instant Mike yelled out a warning: "He's got a gun." (Tr. I 139-40).

Moments after yelling the warning, Mike said the petitioner fired a blast from his shotgun, causing Mike to duck inside the pickup and remove a small pistol kept under the front seat. (Tr. I 191-192). Stacey reacted by yelling to her son Jacob to lock the truck doors, but Rawlins, Sr. grabbed the door before the boy could get it closed. (Tr. I 141, 193). Jacob's father Mike grabbed the door and shut it, then headed back to the driver's side with his wife Stacey following right behind him. (Tr. I 195). Rawlins, Sr. followed Stacey continuing to demand she pick up the papers. (Tr. I 141-43, 195-196). When Mike and Stacey slid back in the driver's side, Mike tossed the gun back under the seat and put the pickup in reverse. (Tr. I 195).

Mr. Rawlins, Sr. was standing just inside the open driver's door as Mike Ayres slowly started backing up. Mr. Rawlins continued to demand that Stacey 'pick up the papers' and he was banging his body hard against the open door. (Tr. I 141-44, 195-96). Mike said that

Rawlins Sr. stayed just inside the driver's door as the pickup traveled backward approximately 50 to 60 feet. (Tr. I 197). Rawlins, Jr. started shooting. A shot hit Jacob.

Stacey testified her son Jacob was tall enough petitioner could see Jacob inside the pickup truck from the place he was standing when he was shooting. (Tr. I 171). Mike Ayres said when the petitioner was firing at them he had a clear unobstructed view into the cab of the pickup. (Tr. I 230). Petitioner appeared to grasp the serious repercussions of firing shots into the Ayres' pickup truck which ultimately resulted in wounding Jacob. When questioned by Sheriff Joe Russell he told the Sheriff several times to shoot him because he deserved it. (Tr. I 241).

"Sufficiency of the evidence can be considered to be a mixed question of law and fact." Case v. Mondagon, 887 F. 2d 1388, 1392 (10th Cir. 1989), cert. denied, 494 U.S. 1035 (1990). In federal habeas review of a state court conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original).

The Supreme Court has repeatedly emphasized the deference the reviewing court owes to the trier of fact and "the sharply limited nature of constitutional sufficiency review." Wright v. West, 505 U.S. 277, 296 (1992) (citing Jackson, 443 U.S. at 319). "[A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that

resolution." Jackson, 443 U.S. at 326. The court must "accept the jury's resolution of the evidence as long as it is within the bounds of reason." Grubbs v. Hannigan, 982 F. 2d 1483, 1487 (10th Cir 1993) (citing United Sates v. Edmondson, 962 F. 2d 1535, 1548 (10th Cir. 1992)). "To be sufficient, the evidence supporting the conviction must be substantial; that is, it must do more than raise a mere suspicion of guilt." Beachum v. Tansy, 903 F. 2d 1321, 1332 (10th Cir.), cert. denied, 498 U.S. 904 (1990) (citing United Stated v. Troutman, 814 F. 2d 1428, 1455 (10th Cir. 1987)).

To determine whether there was sufficient evidence presented at trial to sustain petitioner's conviction, the court first must look to Oklahoma law for the elements required for the crime. The elements with intent to kill are as follows:

> First, intentional and wrongful;
> Second, shooting another person with;
> Third, the intent to take human life.

OUJI CR 4-4.

On direct appeal the Court of Criminal Appeals held as follows: "Viewed in the light most favorable to the State, a rational trier of fact could have found all the essential elements of Shooting with Intent to Kill in Case No. CF-2003-78 beyond a reasonable doubt and the evidence was sufficient to sustain the conviction." Summary Opinion at 4.

After careful review of the record, this court finds the evidence was sufficient under the standard of Jackson v. Virginia, and the determination by the Oklahoma Court of Criminal Appeals was consistent with federal law. This ground for habeas relief fails.

II. Ineffective Assistance of Counsel

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the two-part test for determining the validity of a habeas petitioner's claim of ineffective assistance of counsel. The test requires a showing that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." Id. At 687.

Petitioner makes three arguments regarding ineffective assistance of trial counsel. The first of these arguments is in regard to the decision of his attorney to not have the Ayres gun tested. Petitioner's argument is based upon the premise the testing of the gun would have been beneficial to his case. The state had possession of the Ayres gun so it was possible for either party to test the gun. It is unknown why defense counsel did not have the Ayres gun tested. It is possible that defense counsel had received word from his client testing would not be beneficial because he was not fired upon. When a conversation with a defendant gives counsel reason to believe the investigation or another line of defense would be fruitless or even harmful, counsel's decision not to pursue this investigation may not be later challenged as unreasonable. Strickland, 466 U.S. at 691. Petitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Pickens v. Gibson, 206 F. 3d 988, 1001)10th Cir. 2000). Petitioner failed to overcome this presumption. Without testing, petitioner was free to make the argument he was fired upon first. Petitioner offers only speculation the test result would have been beneficial. Speculation is insufficient to sustain a habeas claim. Hall v. Bellmon, 935 F. 2d 1106, 1110 (10th Cir. 1991). In order to be successful on a claim for ineffective assistance of trial counsel petitioner must show counsel's performance was

deficient and actual prejudice. Petitioner has failed to establish either of these prongs. Accordingly, this proposition must fail.

The second and third arguments petitioner advances regarding ineffective assistance of trial counsel is the failure of his counsel to object to certain remarks which he claims constitute prosecutorial misconduct or remarks which he classifies as unduly prejudicial evidence. His first example of such and occurrence was when former Sheriff Abel said in his testimony the modified shotgun the petitioner fired was made "for killing people". (Tr. II 377). The answer was given to clarify the prior answer, in which Abel described the shotgun as an "anti-personnel type firearm". (Tr. II 376). Due to the nature of the weapon, this was not inaccurate and no objection was warranted. Error does not occur upon trial counsel's failure to object when there is no valid basis. Martin v. Kaiser, 907 F. 2d 931, 936 (10th Cir. 1990).

The second statement from witness Abel was his reference to the fact the witness was a former Sheriff and that the state's attorney was a former District Judge. (Tr. II 374). The jurors were instructed to decide the case based only on evidence presented, not on the prior jobs of the attorneys or witnesses. Unless there is specific evidence to the contrary, it will be presumed that jurors followed instructions. Hale v. Gibson, 227 F. 3d 1298, 1325 (10th Cir. 2000).

Finally, petitioner argues with his attorney's failure to object to the testimony of Mike Ayres when he testified that he believed the petitioner would have shot at him had he chosen to go around the front of the truck. (Tr. II 228). Mr. Ayres' explanation of his choice regarding his movements during this incident were highly relevant. The jury was free to believe or

disbelieve the witness based on the instructions they were given.

In regard to the ineffective assistance of counsel claim the Oklahoma Court of Appeals rejected the entire argument stating:

> Here, evidence overwhelmingly showed that Appellant fired at all three victims at close range, with an assault weapon, as they were attempting to leave the Rawlin's property. Appellant has not shown that, but for counsel's errors, the outcome of the proceeding would have been different. Summary Opinion at 4.

Petitioner has simply failed to establish either prong of the Strickland standard with any of his arguments. The Oklahoma Court of Criminal Appeals denied petitioner's relief on this claim regarding ineffective assistance of counsel must be denied.

III. Prosecutorial Misconduct

In petitioner's next ground for relief, he claims the Oklahoma Court of Criminal Appeals erred in denying his request for relief regarding several claims of prosecutorial misconduct. In examining habeas claims of prosecutorial misconduct, "it 'is not enough that the prosecutor['s] remarks were undesirable or even universally condemned.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Darden v. Wainwright, 699 F. 2d 1031, 1036 (11th Cir. 1983)). Instead, "[t]he relevant question is whether the prosecutor ['s] comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. (Quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

Petitioner's arguments on this claim are broken into several parts. First, petitioner argues some of the prosecutors comments were designed to inflame the jury. The first such comment, however, drew an objection from his attorney which was sustained. The trial court then admonished the jury to disregard the comment. (Tr. III 513). The Supreme Court has held that when a jury is cautioned to disregard certain information by the trial court, the jury is presumed to follow cautionary instructions. Richardson v. Marsh, 481 U.S. 200, 211 (1987).

Petitioner cites two other comments of the prosecutor. The first comment references a picture which shows fragments of skull left in the truck seat and references the seriousness of the injury. If sympathy accrued, it was in the course of proving the elements of intent and the serious nature of the injury to Jacob Ayres. The second comment regarding the serious injuries suffered by the child victim were not unreasonable.

Petitioner then argues that misconduct occurred when the prosecutor made statements aligning himself with the victims. The comments petitioner complained of were as follows "...do justice for Jacob, Stacey and Michael Ayres, simply do justice for what they did to that family and find them guilty." (Tr. III 514). "I'm going to ask you to return the verdict that truth and justice demands. I'm here today to ask for justice for the Ayres family." (Tr. III 536). "Ladies and gentlemen, on behalf of Mr. Brown, myself, the State of Oklahoma, and the entire Ayres family. We appreciate your service for the last three days..." (Tr. III 557). "...and whatever you do to these fellows they'll do it, but the crime that they've committed, ladies and gentlemen, the crime against Mike, Stacey and Jacob

Ayres is forever there, do justice for them." (Tr. III 562).

Comments have to be shown to be an unfair comment on the evidence presented and it must be established that it is reasonably evident the remarks might have influenced the jury to reach more severe verdict of guilt. Darden v. Wainwright, 477 U.S. 168, 181 (1986). It could hardly have been a revelation to the jurors the prosecutor was supporting the victims in pressing the criminal case. Given the State's burden of proof and the overall jury instructions at trial, there is no reasonable chance the jury would have ignored the evidence and rendered a verdict based on their "feelings".

The final argument is that certain comments made by the prosecutor constituted improper vouching for witnesses. The first comment was "Joe Russell, Gary Watson, Kevin McIntyre, Ronald Jones and Paul Abel are all people that are going to be back testifying in court again some day. It's important for them to have a reputation of being a truth teller." (Tr. III 527). Telling the jury that these witnesses' reputation is important and that lying in court would have consequences is a true statement and it does not indicate they are infallible or presumed truthful. The comments are fair and reasonable.

The final statement alleged vouching is a partial sentence. Petitioner attributes the alleged vouching to this statement from the prosecutor: "I would submit to you very honest terms their recollection of events." (Tr. III 558). Petitioner took the last few words of a lengthy sentence which reads as follows: "Well, ladies and gentlemen, you heard the 911 tape made moments after the shooting during which time Mike and Stacey Ayres each were on the phone and what they disclosed

to the dispatcher is very emotional and thereby I would submit to you very honest terms of their recollection of events." (Tr. III 558). That statements are generally more truthful when they are given during an emotional incident is a fair comment.

This issue of prosecutorial misconduct was raised on direct appeal and the Oklahoma Court of Criminal Appeals found the argument to be without merit. Summary Opinion at 5. The court explained their rejection of the claim as follows: "Although some misconduct occurred, in the context of the entire trial and in consideration of all the evidence and the testimony of the witnesses, we cannot find the prosecutor's improper comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Summary Opinion at 5. After careful review of the record, the court finds the decision by the Oklahoma Court of Criminal Appeals was not contrary to or an unreasonable application of federal law, and its decision was not based on an unreasonable determination of the facts. Accordingly, habeas relief is not warranted.

IV. State Law Issues

Petitioner's fourth ground for relief deals with inadmissible hearsay. His fifth ground of relief is whether the trial court erred in making certain comments to the jury regarding their sentencing duties. Both claims were rejected by the Oklahoma Court of Criminal Appeals.

Petitioner's fourth claim is that certain statements attributed to the petitioner's father were hearsay statements that had been improperly admitted. State evidentiary determinations ordinarily do not present federal constitutional issues. "[I]t is not the

province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (citing 28 U.S.C. § 2241; Rose v. Hodges, 423 U.S. 19, 21 (1995) (per curium)). "Habeas corpus is a civil proceeding and the burden is upon the petitioner to show by a preponderance of the evidence that he is entitled to relief." Beeler v. Crouse, 332 F. 2d 783, 783 (10th Cir. 1964) (citing Teague v. Looney, 268 F. 2d 506 (10th Cir. 1959)). Failure to present a federal constitutional issue is a fatal flaw in habeas corpus proceedings. Tapia v. Tansy, 926 F. 2d 1554, 1556 (10th Cir 1991). The court has reviewed the statements at issues and agrees with the Oklahoma Court of Criminal Appeals that the "statement's attributed to the Appellant's father did not ultimately affect the outcome of the trial and any error in their admission was harmless beyond a reasonable doubt." This court finds the state court's conclusion was not unreasonable. Here the court finds petitioner had failed to present an argument supporting federal habeas relief in relation to ground four.

In Petitioner's fifth ground for relief, he submits the trial judge's revelation of the fact that under Oklahoma law, to reach a unanimous decision, caused the jury to recommend an excessive sentence of twenty-five years imprisonment. The issue was raised in direct appeal, and the Oklahoma Court of Criminal Appeals found the argument did not warrant reversal of the conviction or modification of the sentence. This argument does not set forth a cognizable federal claim either. The issue of sentencing is one which is not cognizable in this federal habeas corpus proceeding. "...federal habeas relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67 (1991).

Accordingly for the reasons set forth, these two grounds for relief should be denied.

V. Cumulative Error

Petitioner's final ground for relief is he claims the Oklahoma Court of Criminal Appeals erred in finding the cumulative effect of the alleged errors did not warrant reversal of the conviction. Petitioner has failed to establish under state law, as well as under federal law, that he is entitled to federal habeas relief on any claim. Thus, there is no accumulation of state trial error. Accordingly, habeas relief is not warranted on this claim.

ACCORDINGLY, Petitioner's petition for a writ of habeas corpus is DENIED, and this action is, in all respects, DISMISSED.

DATED this 14th day of October 2008.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RICKY DALE RAWLINS,	)
	) Date Filed:
Petitioner-Appellant,	) October 2, 2009
	)
v.	) No. 08-7108
	)(D.C. No. 6:07-CV-00359-
DAVID C. MILLER, Warden,	)FHS-KEW)
	) (E.D. Okla.)
Respondent-Appellee.	)

ORDER DENYING
CERTIFICATE OF APPEALABILITY[1]

Before LUCERO, BALDOCK, and MURPHY, Circuit Judges.

After a jury trial, Ricky Dale Rawlins (Ricky) was convicted in Love County District Court in three consolidated cases. The Oklahoma Court of Criminal Appeals (OCCA) reversed Ricky's convictions in two of

[1] After examining appellant's application for a certificate of appealability and brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

the cases and ordered a new trial, but it affirmed his conviction for shooting with intent to kill in the third case. Ricky then filed in the federal district court a petition for habeas corpus under 28 U.S.C. § 2254 regarding the third case. The court denied the petition, and Ricky now seeks a certificate of appealability (COA) that would allow him to appeal from that denial. See 28 U.S.C. § 2253(c)(1)(A). Because we conclude that Ricky has failed to make "a substantial showing of the denial of a constitutional right," id. § 2253(c)(2), we deny his request for a COA and dismiss the appeal.

I. Background

The parties are familiar with the facts, so we set out only those most relevant to the present matter. Because Ricky challenges the sufficiency of the evidence against him, we view the evidence in the light most favorable to the prosecution, see Jackson v. Virginia, 443 U.S. 307, 319 (1979), but we also point out Ricky's contrary view of certain facts pertinent to the issues.

On Wednesday, April 16, 2003, Mike Ayres drove his wife, Stacey Ayres, to the trailer house where Ricky lived with his parents so that Stacey could serve process on Ricky's brother, Kenneth Rawlins. Stacey was not certain that Kenneth lived there, but she believed he had been served there before. The Rawlins's house is in a rural section of Love County and about a mile from property owned by Mike. Mike and Ricky worked at the same tire company. Mike also knew Ricky's father, Ricky Rawlins, Sr. (Mr. Rawlins), and had seen Kenneth a couple of times.

Mike drove his truck up the Rawlins's long driveway and parked just south of a cattle guard at the entry to a large fenced yard adjacent to the house. As Stacey walked from the truck toward the house, Mr. Rawlins met her halfway across the yard and told her that Kenneth was not there. After informing Mr.

Rawlins of her purpose and that she would return on the weekend, she left.

Three days later, Stacey attempted to serve Kenneth at the Rawlins's home again. This time she was accompanied by Mike and his twelve-year-old son; Jacob Ayres. All three were seated in the front seat of Stacey's extended-cab pickup truck. Like the first time, Mike parked just south of the cattle guard at the entry to the yard, facing north, toward the house. Stacey got out and halfway across the yard met Mr. Rawlins, who told her that Kenneth was not there. Mike, now standing beside the left front fender, saw someone looking out the front door that he believed was Kenneth and hollered "there he is." Aplt. App'x, Vol. 2 at 379:7. Mr. Rawlins would not accept the papers, so Stacey dropped them at his feet and said "tell him he's served." Id. at 298:20-21. She started to walk back toward the truck, but Mr. Rawlins followed her, complaining that she was littering his property, demanding that she pick up the papers before she left, and threatening to call the sheriff.

With the confrontation escalating in volume, Ricky came out of the house with a 12-gauge, pistol-grip shotgun. Ricky "jacked around to make sure it was loaded" and a "live cartridge hit the ground." Id., Vol. 3 at 627:10-12. He advanced slowly across the yard. In fear for his family, Mike retrieved a handgun Stacey kept under the seat of her truck, went around the rear of the truck with the gun pointed at the ground, and yelled "they have a gun." Id., Vol. 2 at 389:13. Meanwhile, Mr. Rawlins and Stacey had reached the truck on the passenger side. Mr. Rawlins, who was repeating his demand that Stacey pick up the papers, slammed shut the passenger door so that Stacey could not get in. Mike told Jacob to lock the door, but Mr. Rawlins opened it. Mike then forced the door shut, and Jacob was able to lock it.

With the gun still pointed toward the ground, Mike guided Stacey around the front of the truck and into the cab through the driver's door. He threw the gun on the floor but he could not shut the door because Mr. Rawlins was standing inside of it. Ricky now was just to the north of the cattle guard, and Mike started backing the truck slowly down the driveway with Mr. Rawlins walking along inside of the door, pushing on it with his back as if to break it off and repeating his demand that they pick up the service papers. Mike kept telling Mr. Rawlins that they just wanted to leave.

After slowly backing in this manner for about fifty or sixty feet, Mike gave the truck a little gas to see if Mr. Rawlins would get out of the door, but Mr. Rawlins maintained his position. Mike then backed slowly for another fifty or sixty feet, at which point he cut the wheels sharply to the left and stepped on the gas. The maneuver displaced Mr. Rawlins from the door, and the truck came to a stop on the grass facing southeast, pointed at an angle away from the house. Mike heard Mr. Rawlins telling Ricky to shoot. Mike shut the door, stepped on the gas, and turned south to head down the driveway. As he did so, Ricky, who had crossed over the cattle guard, fired the first of five shots, each of which contained fifteen .32 caliber pellets. The shot shattered the rear window on the driver's side of the extended cab and the front window on the passenger side. The recoil from the gun bloodied Ricky's face. At some point, Kenneth, who had been in the house the whole time, came out with a handgun and, just after Ricky began shooting, fired five shots. In all, fifteen to twenty shotgun pellets and bullets struck the left side and rear of the truck. One of the shotgun pellets hit Jacob in the head. He sustained a life-threatening injury but survived.

Ricky's version of events differs in that he testified that he got the shotgun and came out of the house only after seeing Mike come around the rear of

the truck pointing Stacey's pistol at his father. He stated that he did not recognize Mike or Stacey and that he did not know that Jacob was in the truck. He claimed that his father asked Mike if he were going to run him down and Mike said he was. Ricky said that his father was thrown to the ground by the maneuver that displaced Mr. Rawlins from inside the driver's door, and that his father then scrambled away from the truck and toward some horse trailers. With the truck at a stop, Mike fired a shot at Mr. Rawlins by reaching over his left arm with his right and firing backwards out of the open truck door. That was when Ricky began shooting. Ricky stated that he fired the first shot in the air, and that with the other shots, he was trying to shoot out the truck tires. He testified that he felt his father was in imminent danger of death and therefore he was justified in using deadly force.

Ricky and Kenneth were tried together. The jury apparently disagreed with Ricky's version of events and rejected his defense, as it convicted him of shooting with intent to kill Mike. The court sentenced him to twenty-five years' imprisonment in that case.[2]

After the OCCA affirmed the conviction, Ricky filed his § 2254 petition in federal district court. He raised seven claims, four of which he seeks to raise in this appeal: the evidence was insufficient to convict him; the admission of hearsay statements made by his father violated his Sixth Amendment right to confront the witnesses against him; certain comments by the prosecutor denied him a fair trial; and there was

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The jury also convicted Ricky of assault and battery with a deadly weapon in the cases involving Stacey and Jacob, but again, the OCCA reversed those convictions and remanded for a new trial; they are not at issue in this appeal. The OCCA also overturned Kenneth's conviction in the case involving Mike and remanded for a new trial, but affirmed his convictions in the cases involving Stacey and Jacob.

cumulative error. After an evidentiary hearing, at which Ricky's father testified, the district court denied relief and did not rule on his application for a COA. Ricky now seeks a COA from this court to appeal the district court's decision. For the reasons that follow, we deny his request.

II. Standards of Review

Issuance of a COA is jurisdictional. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). That is, unless the district court or this court first issues a COA, a state prisoner may not appeal from the denial of federal habeas relief. 28 U.S.C. § 2253(c)(1)(A). Our review of Ricky's appeal is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See Snow v. Sirmons, 474 F.3d 693, 696 (10th Cir. 2007). Under AEDPA, a COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." Id. § 2253(c)(2). To meet this standard, Ricky must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 336 (quotations omitted). Although Ricky need not demonstrate that his appeal will succeed to be entitled to a COA, he "must prove something more than the absence of frivolity or the existence of mere good faith." Id. at 338 (quotations omitted).

When the state court has adjudicated the claims on the merits, federal habeas relief is only available when the state court's adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court[,]" or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §

2254(d). "When reviewing a state court's application of federal law, we are precluded from issuing the writ simply because we conclude in our independent judgment that the state court applied the law erroneously or incorrectly." McLuckie v. Abbott, 337 F.3d 1193, 1197 (10th Cir. 2003). "Rather, we must be convinced that the application was also objectively unreasonable." Id. "This standard does not require our abject deference, but nonetheless prohibits us from substituting our own judgment for that of the state court." Snow, 474 F.3d at 696 (quotations and citation omitted). "To the extent that the state court has not addressed the merits of a claim and the federal district court made its own determination in the first instance, this court reviews the district court's conclusions of law de novo and its findings of fact, if any, for clear error." Id. at 696-97 (quotations omitted).

III. Discussion

A. Confrontation Clause claim

Within this framework, we first address Ricky's Confrontation Clause claim. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. As he did before the OCCA and the federal district court, Ricky relies primarily on the Supreme Court's interpretation of the Confrontation Clause in Crawford v. Washington, 541 U.S. 36 (2004), contending that at trial, his right to confront his father was violated (1) when Kevin McIntyre, an inspector with the district attorney's office, testified that shortly after the incident, Mr. Rawlins said that Mike never pointed the gun at him but kept it at his (Mike's) side the entire time; (2) when the prosecutor read from and questioned Ricky and Kenneth at length about a written statement their father gave to authorities two days after the incident in

which Mr. Rawlins did not mention anything about Mike pointing a gun at him or shooting at him; and (3) when the prosecutor used Mr. Rawlins's statements in closing argument. Ricky claims that his father's oral and written statements are hearsay, and their admission violated his Confrontation Clause rights under Crawford because he did not have the opportunity to cross-examine his father, who was in jail at the time awaiting his own trial in the matter and was available to testify but was never called by the State. See id. at 68 (holding that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination"); id. at 52 (explaining that "statements taken by police officers in the course of interrogations are . . . testimonial"). He also points to his father's testimony, at the § 2254 evidentiary hearing, that (1) he never told Inspector McIntyre that Mike did not point a gun at him and (2) his written statement was a very broad description of what had happened rather than a comprehensive account.

The federal district court appears to have limited its review to the state-law hearsay issue, as it did not reference the Confrontation Clause or Crawford, but the court did determine that the OCCA's resolution of the hearsay issue was not unreasonable. See Aplt. App'x, Vol. 2 at 278-79. In its opinion, the OCCA did not explicitly reference the Confrontation Clause or Crawford either, but summarily concluded that although Mr. Rawlins's statements were hearsay, their admission did not ultimately affect the outcome of the trial, and that any error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18, 24 (1967). In a concurring opinion, Judge Lewis succinctly opined that the admission of Mr. Rawlins's statements violated Ricky's Confrontation Clause rights under Crawford, but that affirmance of the conviction

was proper in light of "other overwhelming evidence of guilt." Aplt. App'x, Vol. 1 at 103.

We need not determine whether to read the OCCA's opinion and Judge Lewis's concurrence together as a determination on the merits of the Confrontation Clause claim. Assuming the admission was constitutional error, it was a trial error, not a structural error. See Crespin v. New Mexico, 144 F.3d 641, 649 (10th Cir. 1998). And whether or not a state appellate court recognizes a constitutional trial error and makes a determination that it is harmless under Chapman, we review the error in habeas proceedings to determine if it had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quotation omitted); see also Fry v. Pliler, 551 U.S. 112, 121-22 (2007) (holding that Brecht governs harmlessness determinations in habeas corpus proceedings regardless of "whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in Chapman"). "[A] substantial and injurious effect exists when the court finds itself in grave doubt about the effect of the error on the jury's verdict." Bland v. Sirmons, 459 F.3d 999, 1009 (10th Cir. 2006) (quotations omitted). And "[g]rave doubt exists where the issue of harmlessness is so evenly balanced that the court feels itself in virtual equipoise as to the harmlessness of the error." Id. at 1009-10 (quotations and alterations in original omitted). For the reasons that follow, we conclude that any error was harmless under this standard.

Under Oklahoma law, a defendant may assert defense of himself or his father (among others) as a justification for homicide "when there is a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished[.]" Okla. Stat. Ann. tit. 21, § 733(2). The defense extends to the use of deadly

force in the case of shooting with intent to kill. See Chapple v. State, 866 P.2d 1213, 1215 (Okla. Crim. App. 1993). But significantly, "[a]t the point where the apparent danger ceases, the right of self-defense ceases." Mammano v. State, 333 P.2d 602, 605 (Okla. Crim. App. 1958) (quotation omitted).

In this case, there was adequate evidence from which a reasonable jury could find that any imminent danger to Mr. Rawlins had passed by the time Ricky fired the first shot. First, there was expert testimony that a group of shotgun pellets came from a sixty-degree angle behind the driver's side of the truck and a second group struck from directly behind the truck. Further, Inspector McIntyre testified that broken glass from the windows was found where the truck left the grass and reentered the driveway. This evidence tended to show that the Ayreses were in retreat when Ricky began shooting. Second, Mr. Rawlins had been thrown clear of the truck and, according to Ricky, had scrambled toward the horse trailers, away from Mike's truck. Third, Ricky's version of events was called into doubt on cross-examination through various lines of questioning, including how far Mike backed the truck before executing the maneuver that displaced Mr. Rawlins from the door and the logistics of Mike firing with his right hand over his left arm, through the open truck door and directly behind the stopped truck. Moreover, the prosecutor elicited testimony from which a rational juror could have concluded that Ricky made misrepresentations as to his assets in completing forms requesting court-appointed counsel, suggesting a general lack of candor. Fourth, Kenneth testified that when he started shooting just after his brother did, the victims were no threat to his father because they were driving away. Finally, one of the investigating agents, Gary Watson, testified that on the night of the incident, Ricky told him he had overreacted, although Ricky denied saying this.

Despite the apparently quick pace at which the events unfolded, a rational jury could conclude that a reasonable person in Ricky's position would have determined that any danger to Mr. Rawlins had passed and that the use of deadly force was no longer justified. Thus, because Mr. Rawlins's hearsay statements that Mike never pointed the gun at him but kept it pointed at the ground concerned a matter prior in time to the cessation of the danger on which Ricky predicated his defense, its admission did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623 (quotation omitted). That is, because the evidence supported a finding beyond a reasonable doubt that the danger had passed, whether or not Mike had pointed the gun at Mr. Rawlins became immaterial. Further, Ricky's credibility issues, outlined above, formed an independent and adequate basis to reject his allegation that Mike shot at Mr. Rawlins first. Accordingly, Ricky is not entitled to a COA on this issue.[3]

B. Sufficiency of the evidence

Turning to the sufficiency-of-the-evidence claim, Ricky contends that there was insufficient evidence as to two elements of the charge of shooting with intent to kill, that his acts were "intentional[] and wrongful[]" and that he had an "intent to kill any person." Okla. Stat. Ann. tit. 21, § 652(A). The OCCA summarily determined that there was sufficient evidence of all the elements of the offense. In reviewing a claim of

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[3] Even if viewed as a purely state-law evidentiary claim (i.e., that the trial court improperly admitted the hearsay statements of Mr. Rawlins), as the district court appears to have considered it, such errors only provide a basis for federal habeas relief when they amount to a denial of due process and shock the judicial conscience. See Aycox v. Lytle, 196 F.3d 1174, 1179-80 (10th Cir. 1999). Assuming Mr. Rawlins's statements were hearsay, their admission does not shock our conscience based on our view that ultimately they were immaterial to the outcome of the trial.

insufficient evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319.

> Our review under this standard is sharply limited, and a court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.

Turrentine v. Mullin, 390 F.3d 1181, 1197 (10th Cir. 2004) (quotations and alterations omitted). We must "accept the jury's resolution of the evidence as long as it is within the bounds of reason." United States v. Triana, 477 F.3d 1189, 1195 (10th Cir. 2007) (quotation omitted).

The intent required for an offense under § 652(A) can be shown by circumstantial evidence. See Carpitcher v. State, 586 P.2d 75, 77 (Okla. Crim. App. 1978). Here, there was sufficient circumstantial evidence from which a reasonable juror could find that Ricky possessed the requisite intent. Ricky admitted to having received basic training with an M-16 while in the Marine Corps, suggesting that he had some familiarity with firearms. Mike and Stacey both testified that the first shot blew out the windows, and the State's ballistics expert testified that the windows were blown out by shotgun pellets fired from a gun likely held between shoulder and eye level. This evidence contradicted Ricky's testimony that he fired the first shot in the air, as did the fact that the recoil from the first shot bloodied his face. The ballistics expert also testified that numerous shotgun pellets struck the side panel, tailgate, bumper, and license plate of the truck, which is adequate to support a finding that Ricky intended to shoot Mike rather than, as he claimed, into

the air or at the truck's tires. And again, the evidence supported a finding that the Ayreses were in retreat when Ricky began shooting and remained in retreat as he continued firing. Firing additional shots at a retreating vehicle is a factor in determining intent from circumstantial evidence. See id. For these reasons, Ricky is not entitled to a COA on this issue.

C. Prosecutorial misconduct

Ricky next claims that his due process rights were violated by certain comments the prosecutor made during closing argument that inflamed the jury, aligned the prosecution with the victims, and improperly vouched for the credibility of witnesses. Without identifying any particular comments, the OCCA concluded that "some misconduct occurred" but it did not "infect[] the trial with unfairness as to make the resulting conviction a denial of due process," Aplt. App'x, Vol. 1 at 100, which is the controlling standard under Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). We have reviewed the comments and conclude that, for substantially the same reasons stated by the district court, the OCCA's resolution of this issue was not contrary to or an unreasonable application of DeChristoforo.

D. Cumulative error

Ricky's final contention is that there was cumulative error. "A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc). Therefore, "a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." Id. at 1471. An "error" means "any violation of an objective legal rule." Id. at 1470 n.7. Here, the only arguable violations of an

objective legal rule were the trial court's admission of Mr. Rawlins's hearsay statements in violation of the Confrontation Clause and some of the prosecutor's remarks during closing argument. Given the nature of the errors as detailed above and by the district court, we conclude that even viewed collectively, the errors remain harmless.

IV. Conclusion

For the foregoing reasons, we deny the request for a certificate of appealability and dismiss this appeal.

Entered for the Court

Michael R. Murphy
Circuit Judge